NGUI YU THAU

v.

WONG MU KHYUN & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[SUIT NO: S22-35-1997]
26 SEPTEMBER 2001

CIVIL PROCEDURE: *Action - Claim for recovery of land - Preliminary issue - Whether action caught by limitation - Failure to reply to statement of defence which raised defence of limitation - Whether fatal to case - Dispute as to when time began to run - Claim for adverse possession - Whether issues should proceed to trial proper - Rules of the High Court 1980, O. 18 rr. 3(1), 14(1) - Sabah Limitation Ordinance, item 74 Schedule*

The plaintiff as administrator of the estate of one Ngui Tet Loi ('the deceased') filed this action against the defendants for the recovery of certain lands of the deceased which were transferred to the 1st defendant. The plaintiff claimed that the said transfer was done *vide* defective instruments wherein the alleged signatures of the deceased were forged.

The 3rd defendant raised a preliminary issue that the plaintiff's action was statute-barred under the Sabah Limitation Ordinance ('the Ordinance'). It was claimed that: (1) the plaintiff failed to file a reply to the statement of defence which raised the defence of limitation; (2) the plaintiff's action was not filed within the three years from the date of his appointment as the administrator of the estate of the deceased; and (3) the plaintiff's claim for possession was not made within 12 years of the 1st defendant's possession of the said lands.

Held:

[1] Generally, there is no necessity to file a reply after a defence is served if the purpose is merely to deny the allegations contained in the defence. A joinder of issues is implied (O. 18 rr. 3(1) and 14(1) Rules of the High Court 1980). A reply, however, is necessary where a plaintiff wishes to raise any specific matters in answer, for instance to a defence in limitation thereby asserting that the defence is not maintainable. The pleadings herein showed that there were sufficient factual assertions in the plaintiff's statement of claim whereby the issue of whether or not the action was statute-barred could be determined by the court. Thus, there was no necessity to advance any other factual materials in the nature of a reply. Otherwise that would only be repeating what had already been stated in the plaintiff's statement of claim. (pp 156 g-h & 157 c)

[2] From the submissions of the parties herein, it was clear that there was a dispute as to which date should be applicable for computing when the period of limitation began to run. If the date of registration of the Memoranda of Transfer was relied upon, then the action of the plaintiff was not caught by the Ordinance. However, if the date of the execution of the Memoranda of Transfer was relied upon, then for the action to be caught by the Ordinance it must be assumed that the plaintiff knew of the existence of the instruments concerned at the time when he was appointed the administrator for the estate of the deceased. But such a fact could not be assumed. It was therefore essential that the plaintiff should be enquired upon during his examination as a witness as to the probability of him knowing the existence of those instruments and the forgery committed thereof. A proper trial was therefore necessary to facilitate such an enquiry. (pp 158 f-i & 159 a)

[3] It was for the 3rd defendant to establish that the plaintiff or the deceased had been dispossessed of the said lands for twelve years or more. It could not be assumed that the 1st defendant must have taken possession of the said lands from the date of execution of the Memoranda of Transfer. Evidence had to be led during a trial proper to determine such a fact. (p 160 a-b)

[Preliminary issue ruled for plaintiff; date for trial proper to be set.]

Case(s) referred to:
Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 ***(refd)***
KEP Mohd Ali v. KEP Mohd Ismail [1981] 1 MLJ 10 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 rr. 3(1), 8(1), 14(1)
Sabah Land Ordinance, s. 88
Sabah Limitation Ordinance, item 74

Limitation Act 1963 [India], art. 56

Other source(s) referred to:
BB Mitra, *The Limitation Act*, 20th edn, pp 642-643
Bullen & Leake, *Jacob's Precedents of Pleadings*, 12th edn, p 107
Malaysian Court Forms, paras 93, 143

For the plaintiff - Mohd Anuar Abd Ghani; M/s Anuar Datuk Ghani & Assoc
For the 2nd defendant - Edwin Tsen; M/s Tan Pang Tsen & Co
For the 3rd defendant - Yap Pak Vui; M/s Yap & Chin
For the 4th defendant - Halim Hanapiah; AG's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum J:

Introduction

The matter before me for ruling is a preliminary issue between the plaintiff and the 3rd defendant. Simply put the 3rd defendant is contending that the action of the plaintiff is statute-barred. The plaintiff thinks otherwise. This ruling is therefore requested by the parties before the trial proper of the action begins.

There are three other defendants in this action. However only the 3rd defendant is raising the defence of limitation. As for the 1st defendant no appearance has been entered and a certificate to that effect has been duly issued.

The Claim Of The Plaintiff

The plaintiff is seeking for several reliefs, namely:

(a) A declaration that the transfer of the said Lands to the 1st Defendant and all subsequent dealings, transfers including registration to the 2nd and 3rd Defendants be declared null and void.

(b) That the issue document of title be delivered up to the 4th defendant and that the registrar of title be rectified and that the name of the Plaintiff be endorsed on the Register Book and the Issue Document of Title.

(c) A declaration that the Plaintiff is entitled to the recovery of possession of the said Lands as against the 1st, 2nd and 3rd Defendants and all others deriving title from the 1st Defendant.

(d) Damages.

(e) Costs and any other relief as the Honourable Court deems fit and just.

The subject matter of the claim concerns several pieces of lands, namely, CL 115325721, CL 115325758, CL 115325749 and CL 116194140. But as between the plaintiff and the 3rd defendant only three pieces of those lands are relevant, namely, CL 115325721, CL 115325749 and CL 116194140 ('the said lands').

It is the pleaded case of the plaintiff that the said lands were once registered in the name of Ngui Tet Loi, (the deceased). The plaintiff was appointed the administrator of the deceased's estate on 7 September 1987. That it is the case of the plaintiff, *inter alia*, that the said lands were transferred to the 1st defendant *vide* defective instruments in that the alleged signatures of the deceased in the Memoranda of Transfer were forged. And in turn the said lands were transferred to the 3rd defendant through the 2nd defendant as the attorney of the 1st defendant on 5 March 1996. By reason of the defective nature in

the transfer of the ownership of the said lands to the 1st defendant it is the case of the plaintiff that the registration of the titles to the 1st defendant's name is therefore invalid, null and void. And in turn it is asserted that the execution of the purported power of attorney by the 1st defendant in favour of the 2nd defendant was made 'in an illegal and invalid capacity'. Thus, a declaration is therefore sought that the plaintiff is entitled to recover possession of the said lands as against, *inter alia*, the 3rd defendant having derived titles of the same from the 1st defendant. Rectification of the Register Book and the Issued Document of Title is also being prayed for.

The Contention Of The 3rd Defendant

The defence of the 3rd defendant on the issue of limitation is found in para. 6 of the statement of defence and reads:

> The 3rd Defendant will further say that the Plaintiff's claim herein is statute barred under the Limitation Ordinance as the cause of action accrued on the date the Plaintiff was allegedly appointed the administrator of the deceased's estate, on 13th July 1987.

The date of appointment of the plaintiff as the administrator of the estate of the deceased is erroneous and has since been noted to be on 7 September 1987.

In contending that the claim of the plaintiff is statute-barred learned counsel for the 3rd defendant has taken a three-pronged approach. Firstly he submits that there was a failure on the part of the plaintiff to file a reply after he was served with the statement of defence which raised *inter alia* the defence of limitation. Order 18 r. 3(1) and r. 8(1) of the Rules of the High Court 1980 were cited. And that according to learned counsel is fatal to the plaintiff's case. An extract from *Bullen and Leake and Jacob's Precedents of Pleadings* (12th edn) at p. 107 was reproduced that stated thus, *inter alia*:

> … The reply is the proper place for meeting the defence by confession and avoidance. Thus in order to defeat the defence of the Limitation Act, the plaintiff must specially plead in his reply any fact upon which he relies to take the case out of the statute ...

And it is further argued that since there are no facts on which the plaintiff can rely to defeat the plea of limitation he is no longer permitted to adduce any evidence as such in his submission or oral evidence. It is also submitted that upon the defence of limitation being raised, the burden of pleading and proving that the action has been brought within the limitation period shifts to the plaintiff.

Secondly, it is contended that the claim of the plaintiff is obviously statute-barred in that executions of the memoranda of transfer affecting the said lands in favour of the 1st defendant were done on 9 October 1985 and that the plaintiff was appointed the administrator on 7 September 1987. The period of limitation is three years from the accrual of the cause of action which according to learned counsel should be from 7 September 1987. And hence the action should have been filed on or before 7 September 1990. In this case it was filed only on 22 October 1997.

Thirdly, it is also contended that even if the action is premised on claim for possession independently it is also statute-barred. Learned counsel said that since there is no assertion by the plaintiff as to when the 1st defendant took possession of the said lands it should only mean that possession of the same must have taken place upon the executions of the memoranda of transfer on 9 October 1985. And learned counsel goes on to say that the limitation period of claim for possession is twelve years from the time of dispossession. Hence the suit should have been commenced on or before 9 October 1997. In this case it was filed on 22 October 1997.

But on the issue of claim for possession it is the contention of learned counsel for the 3rd defendant that such claim should not be taken as distinct and separate from the claim to annul the transfer. It is argued that possession is consequential to any order that may be made upon the annulment of the transfer.

The Contention Of Learned Counsel For The Plaintiff

Learned counsel for the plaintiff starts his submission by stating the general principles on pleadings. And he says that the plaintiff is only bound to state facts which make out his case, pleading neither law nor evidence. Further it is submitted that where no reply is filed there would be an automatic joinder of issues. And that even if a fact is not stated in a statement of claim or there is no reply it will be sufficient if the facts are satisfactorily presented or developed in the proceedings or there are sufficient materials before the court to arrive at a decision. The case of *K.E.P Mohd Ali v K.E.P Mohd Ismail* [1981] 1 MLJ 10 is cited for the foregoing proposition of the law.

It is also contended that in the present case the statement of claim of the plaintiff has clearly stated that the said lands in question were registered to the 1st defendant on 15 July 1995. Thus, it is asserted that since the fact on the registration has been pleaded and when read with item 74 of the Schedule to the Sabah Limitation Ordinance (the Ordinance) the issue of limitation does not arise. Hence learned counsel argues that there is no necessity for a reply to be filed.

As regards the scope of item 74 of the Ordinance it is submitted that it should be read disjunctively. And that time should begin to run when the issue or registration came to the knowledge of the plaintiff. And in this case learned counsel says that time should start to run from the knowledge of the registration and such could only have been known when the registration took place and not before. Since the registration took place on 15 July 1995 the period should only expire on 14 July 1998. Meanwhile the present action was filed on 22 October 1997. Section 88 of the Sabah Land Ordinance has also been cited to support the notion of when registration would be deemed done.

Learned counsel for the plaintiff also submits that fraud and the knowledge of it are questions of fact which can only be determined by way of evidence adduced during a proper trial.

On the issue of adverse possession it is contended that since the 3rd defendant was only registered as the owner of the said lands on 5 March 1996 it should be taken that it only took possession from that date. Alternatively it is submitted that even if assuming the 3rd defendant took possession from the date of the power of attorney dated 5 May 1995 the twelve years, being the limitation period under the Ordinance, has not expired.

The ambit of the case of *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504 as relied upon by learned counsel for the 3rd defendant is also disputed. It is contended by learned counsel for the plaintiff that that case is not an authority to say that failure to file a reply is fatal where limitation has been pleaded. That case according to learned counsel was decided after the examination of the writ, the statement of claim and defence and in all the circumstances and the facts therein.

Finding

I will first deal on the legal implication due to the failure of the plaintiff to file his reply to the defence of the 3rd defendant.

Generally there is no necessity to file a reply after a defence is served if the purpose is merely to deny the allegations contained in the defence. A joinder of issues is implied. (see: O. 18 rr. 3(1) and 14(1) Rules of the High Court 1980 (RHC)). A reply is however necessary where a plaintiff wishes to raise any specific matters in answer, for instance to a defence of limitation, thereby asserting that the defence is not maintainable. (see: O. 18 r. 8(1) RHC). It is also a settled law that when limitation has been raised as a defence, the burden of pleading and proving that the action has been brought within the limitation period shifts to the plaintiff. If the plaintiff then intends to rely on any disability he should plead it fully in his reply. And disability herein refers to a situation whereby time does not run against a person, such as during his

infancy or unsoundness of mind. However before disability can be of any use such a situation has to be existing on or before the time from which period begins to run. (see: *Malaysian Court Forms* paras. 93 and 143).

In the instant case there is no question of the plaintiff relying on any disability. Hence the question to ask is whether there was a need for the plaintiff to raise any specific matter other than what were stated in his statement of claim before he could say that the defence of limitation could not stand in this case.

Having perused the pleadings as a whole in this case I am inclined to agree with the contention of learned counsel for the plaintiff that subject to proof there are sufficient factual assertions in the statement of claim whereby the issue of whether or not the action is statute-barred as raised in the defence of the 3rd defendant can be determined by this court. Thus, as the pleadings stand I do not think there is any necessity to advance any other factual materials in the nature of a reply. Otherwise that will only be repeating what has already been stated in the statement of claim.

Paragraph 2 of the statement of claim asserts that the registration of the 1st defendant as the owner of the said lands was done on 15 July 1995. Meanwhile it is not clear in the plea of limitation by the 3rd defendant as to which item or items in the Schedule to the Ordinance it intends to rely on. But from the submission of learned counsel for the 3rd Defendant reliance has been made on item 74 of the Schedule. And that item sets the limitation period to three years in connection with an action to declare forgery of an instrument issued or registered. Further, time begins to run when the issue or registration becomes known to the plaintiff.

Now, from the submission of learned counsel for the 3rd defendant it is contended that the memoranda of transfer as between the deceased and the 1st defendant were executed on 9 October 1985. And it is highlighted that the plaintiff was appointed the administrator of the estate of the deceased on 7 September 1987. Thus it is argued that time should be computed to run from the date of appointment since it should be assumed that that was the time when the plaintiff first came to know of the forgery.

The date on which the plaintiff is relying upon is 15 July 1995 and that has been pleaded in the statement of claim while the 3rd defendant is taking the date of the appointment of the plaintiff as the administrator to be the relevant date. As the pleadings stand without a reply filed I am of the view that there is already an obvious joinder of issue in so far as it relates to the plea of limitation. Hence in this case I do not think that the failure of the plaintiff to file a reply to the statement of defence has closed the door for the plaintiff to resist the plea of limitation. The first prong therefore fails.

Next is to determine which of the dates as submitted by the contending parties should be the basis for computing when the period of limitation begins to run in this case.

From the submissions of learned counsel for the parties herein it is obvious that the relevant item in the Schedule to the Ordinance being referred to in relation to the issue of forgery is item 74. That item reads:

Item	Description of suit	Period of Limitation	Time from which period begins to run
74	To declare the forgery of an instrument issued or registered	3 years	When the issue or registration becomes known to the Plaintiff

The 3rd defendant says that time should begin to run from the date of the appointment of the plaintiff as the administrator of the estate of the deceased, that is 7 September 1987. And three years from that date would have been 7 September 1990.

Whereas the plaintiff is saying that the relevant date should be 15 July 1995 being the date of registration with the Central Land Registry of the Memoranda of Transfer purportedly from the deceased to the 1st defendant. And three years from that date would have been 14 July 1998.

From the above it is clear that there is a dispute as to which date should be applicable. The 3rd defendant appears to rely on the fact that the memoranda of transfer were executed on 9 October 1985 and hence by the time the plaintiff was appointed as the administrator for the estate of the deceased those instruments would have been 'issued' as such. And thus the time should run from the date of appointment.

The plaintiff is relying on the date of 'registration' of those memoranda of transfer, that is, 15 July 1995.

I would say that the date of registration of those memoranda of transfer could easily be determined as the same is a matter of public record. And if that is relied upon then I agree that the action of the plaintiff is not caught by the Ordinance.

However if the date of the execution of the memoranda of transfer is taken as the date of the instruments being 'issued' as may be understood under the said item, then for the action to be caught by the Ordinance it has to be assumed that the plaintiff knew of the existence of the instruments at the time when he was appointed the administrator for the estate of the deceased. But

I do not think such a fact can be assumed. It is therefore essential that the plaintiff should be enquired upon during his examination as a witness as to the probability of him knowing the existence of those instruments and the forgery committed thereof. A proper trial is therefore necessary to facilitate such an enquiry.

Of course there is still the question as to the meaning of the word 'issued' employed in that item. Does it mean that the mere execution of the memoranda of transfer amounts to the same being issued? I think that should be left for consideration later on. Suffice it to say that I am inclined to agree that the words 'issued' and 'registration' employed in item 74 should be taken as disjunctive in view of the presence of the word 'or'.

Accordingly at this stage I should postpone making any conclusion as to the merit of the defence of limitation raised by the 3rd defendant in particular as to the applicability of item 74 of the Schedule to the Ordinance until the question of fact as indicated above has been determined. Thus for the moment the second prong of learned counsel for the 3rd defendant also fails.

Incidentally under the Indian Limitation Act 1963 the item equivalent to item 74 is art. 56. And B.B. Mitra on *The Limitation Act* – 20th edn at pp. 642-643 states, *inter alia*:

> Articles 91 to 93 (now 59, 56 and 58, respectively) apply to suits brought expressly to cancel, set aside or declare the forgery of an instrument; but where some substantial relief (eg, possession) is sought and the cancellation or declaration is subservient or merely ancillary and not necessary to the granting of such relief, these Articles do not apply. … But if the relief asking for a declaration that the document is forged is the principal relief and any other relief is merely subsidiary to it, the suit falls under this Article ... the word 'issued' was intended to refer to the kinds of documents to which people commonly apply that term in business … Article 56 therefore fixes a limitation of three years from the date of knowledge of fraud.

Learned counsel for the 3rd defendant says that the claim for possession is only ancillary to the principal claim of annulling the transfer on the ground of forgery. If that is the stand then there is no question of the applicability of item 110 of the Schedule to the Ordinance.

However as summarised above learned counsel for the 3rd defendant states that even if the claim can be taken as praying for possession of the said lands it is his contention that the former owner has been dispossessed of it for more than twelve years before the commencement of the present action. Meanwhile learned counsel for the plaintiff has ignored the date referred to by learned counsel for the 3rd defendant. Instead he has taken the dates in relation to the 3rd defendant only, that is, the date of the power of attorney (5 May 1995) and the registration date (5 March 1996).

It is for the 3rd defendant to establish that the plaintiff or the deceased has been dispossessed of the said lands for twelve years or more. I do not think it can be assumed that since the memoranda of transfer were executed on 9 October 1985 the 1st defendant must have taken possession of the same from that date. Evidence has to be led during a trial proper to determine such a fact. Accordingly the third prong also fails at this stage.

Thus on the preliminary issue raised herein I rule for the plaintiff and that a date for the trial proper of this case should be set.

As for the costs incurred on the preliminary issue I order that it should be costs in the cause.